NO. 80-993

Supreme Court, U. S.
FILED
DEC 16 1980
HARALD RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

GENE PATTERSON, DOROTHY FRANCE, PAULA PATTERSON, LEONARD C. WILSON, NORA W. CROUCH, and J. P. STEVENS EMPLOYEES EDUCATION COMMITTEE, INC.,

Petitioners,

v.

THE NATIONAL LABOR RELATIONS BOARD, JOHN H. FANNING, BETTY S. MURPHY, HOWARD JENKINS, JR., JOHN A. PENNELLO, JOHN C. TRUESDALE, WILLIAM A. LUBBERS, REED JOHNSTON, and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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12-15-80-60

QUESTIONS PRESENTED

1. The question of whether the rights of employees to representation of their own choosing guaranteed by the National Labor Relations Act are suspended because of misconduct by management, has never been decided by this Court.

2. The decision below that the district courts do not have subject matter jurisdiction under Sections 1331, 1337 and 1361 of Title 28 of the United States Code to consider acts in clear violation of the National Labor Relations Act, wherein no judicial review shall otherwise be available, is in conflict with the decisions of this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CASES	ii
TABLE OF OTHER AUTHORITIES	
OPINIONS OF THE COURT BELOW	2
JURISDICTION OF THIS COURT	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	6
STATEMENT OF FACTS	7
REASONS THAT A WRIT OF CERTIORARI SHOULD BE ALLOWED	10
CONCLUSION	33
APPENDIX A—Opinion, U. S. Court of Appeals, 4th Circuit, No. 79-1759, August 4, 1980	34
APPENDIX B—Order, U. S. District Court, E.D. North Carolina, No. 78-74-CIV-8, June 13, 1979	39

Table of Cases

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 27

Accardi v. Shaughnessy, 347 U.S. 260 (1954) 16

AFL v. NLRB, 308 U.S. 401 (1939) 23, 26, 30

Atlas Life Insurance Co. v. W. I. Southern, Inc., 306 U.S. 563 (1939) 23

Briscoe v. Bell, 432 U.S. 404 (1977) 28

Boire v. Greyhound, 376 U.S. 473 (1964) 23, 27, 29, 31

Brotherhood of Railway and Steamship Clerks v. Association for the Benefit of Non-Contract Employees,
380 U.S. 650 (1965) 29

Califano v. Sanders,
430 U.S. 99 (1977) 28

Clark v. Gabriel,
393 U.S. 256 (1968) 29

Davis v. Passman,
99 S.Ct. 2264 (1979) 23

Di Giovanni v. Camden Fire Insurance Assoc.,
296 U.S. 64 (1935) 23

Franks Brothers Co. v. NLRB,
321 U.S. 701 (1944) 12, 21

Furrs, Inc. v. NLRB,
350 F.2d 84 (1965) 12

International Association of Machinists v. NLRB,
311 U.S. 72 (1940) 12, 21

International Typgraphical Union v. NLRB,
371 F.2d 347 (1966) 20

Johnson v. Robinson,
415 U.S. 361 (1974) 28

Leedom v. Kyne,
358 F.2d 184 (1958) . . . 18, 22, 23, 26, 28, 29, 30

Lockerty v. Phillips,
391 U.S. 182 (1943) 29

Morris v. Gressette,
432 U.S. 491 (1977) 28

Myers v. Bethlehem Shipbuilding Corp.,
303 U.S.C. 41 (1938) 22, 23, 24, 25, 32

NLRB v. Anvil Products, Inc.,
496 F.2d 94 (1974) 12

NLRB v. Big Three Industries, Inc.,
497 F.2d 43 (1974) 11, 16, 21, 31

NLRB v. Bishop,
502 F.2d 1024 (1974) 16, 21, 31

NLRB v. Cayuga Crushed Stone, Inc.,
474 F.2d 1380 (1973) 12

NLRB v. Gissell Packing Co.,
395 U.S. 575 (1969) 12

NLRB v. Montgomery Ward & Co.,
399 F.2d 409 (1968) 12

NLRB v. Priced Less Discount Foods, Inc.,
405 F.2d 67 (1968) 12

NLRB v. J. P. Stevens Co.,
623 F.2d 322 (1980) 8

NLRB v. Universal Gear Service Corp.,
394 F.2d 396 (1968) 12

NLRB v. Wyman Gordon,
394 U.S.C. 759 (1969) 14

Oneida Indian Nation v. County of Oneida, New York,
464 F.2d 916 (1972) 25

Physician's National House Staff v. Fanning,
89 L.C. 12 (1980) 24, 32

Service v. Dulles,
354 U.S. 363 (1957) 16

Switchmen's Union v. National Mediation Board,
320 U.S. 297 (1943) 26, 28, 30

Templeton v. Dixie Color Printing Co.,
444 F.2d 1064 (1971) . . 17, 20, 21, 29, 32, 37, 41

Trainor v. Hernandez,
431 U.S. 434 (1977) 23

United States v. Nixon,
418 U.S. 683 (1974) 16

Vitarelli v. Seaton,
359 U.S. 535 (1959) 16

Yakus v. United States,
321 U.S. 414 (1944) 29

Yuba Consolidated Gold Fields v. Kilkearney,
206 F.2d 884 (1953) 23

Table of Statutes

28 U.S.C. 1254(1) 2
28 U.S.C. 1331 . . . . . 3, 22, 28
28 U.S.C. 1337 . . . . . 3, 22
28 U.S.C. 1361 . . . . . 3, 22
29 U.S.C. 157 . . . . . 4, 10
29 U.S.C. 158(a)(3) 8
29 U.S.C. 158(a)(5) 8
29 U.S.C. 159(c) 4, 8, 10, 13
29 U.S.C. 159(d) 22
29 U.S.C. 160(e) 5, 22, 28
29 U.S.C. 160(f) 6, 22

Rule 12(b)(1), F.R. Civ. P. 7

29 C.F.R. 101.18(a) 13, 15
29 C.F.R. 102.63(a) 13
29 C.F.R. 102.67(b) 17
29 C.F.R. 102.71(a) 17
29 C.F.R. 102.72(b) 16

29 Fed. Reg. 15921 (Nov. 28, 1964) 16
39 Fed. Reg. 4080 (Feb. 1, 1974) 16
40 Fed. Reg. 6204 (Feb. 10, 1975) 16

Section 16, Judiciary Act of 1789 24

Table of Other Authorities

Friendly, H., THE FEDERAL ADMINISTRATIVE
AGENCIES 14

Gettman, Goldberg & Herman, UNION REPRESENTATION ELECTION: LAW AND REALTY (Basic Books 1976) 14

Hart, THE POWER OF CONGRESS TO LIMIT THE JURISDICTION OF THE FEDERAL COURTS, 66 Harv. L. Rev. 1362 (1953) 28

N.L.R.B., *Legislative History of the Labor Management Relations Act of 1947* 10

Shapiro, THE CHOICE OF RULEMAKING OR ADJUDICATION IN THE DEVELOPMENT OF ADMINISTRATIVE POLICY, 78 Harv. L. Rev. 921 (1965) 14

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners pray the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth

Circuit, to the end that this Court may review a decision which has been rendered by the United States Court of Appeals for the Fourth Circuit in a civil action involving the parties named above, and,

IN SUPPORT WHEREOF, the Petitioners respectfully show this Court:

OPINIONS OF THE COURT BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit has not been printed in the reports, but it is set forth, together with the judgment of that Court, in the Appendix to this Petition (APPENDIX A). The decision of the Court is reported at 626 F.2d 862 (1980).

The case came to the United States Court of Appeals for the Fourth Circuit from the United States District Court for the Eastern District of North Carolina. The Opinion and Judgment of the United States District Court for the Eastern District of North Carolina is set forth in the Appendix to this Petition (APPENDIX B).

JURISDICTION OF THIS COURT

The Judgment of the United States Court of Appeals for the Fourth Circuit is dated August 4, 1980, and was entered on that date. An Order extending the time within which to file a Petition for a Writ of Certiorari to and including December 17, 1980, was entered on October 21, 1980.

Jurisdiction to review by Writ of Certiorari the Judgment of the United States Court of Appeals for the Fourth Circuit is conferred upon this Court by the provisions of Section 1254(1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity."

Section 1331(a) of Title 28 of the United States Code.

"(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: . . . ."

Sections 1337(a) of Title 28 of the United States Code.

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Section 1361 of Title 28 of the United States Code.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be effected by an agreement requiring membership in a labor

organization as a condition of employment as authorized in Section 158(a)(3) of this title."

Section 157 of Title 29 of the United States Code.

"(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board - -

'(A) By an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this Section or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

'(B) By an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative as defined in subsection (a) of this section;'

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Section 159(c)(1) of Title 29 of the United States Code.

"(e) The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeal to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in Section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The finding of the Board with respect to questions of fact supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided by Section 1254 of Title 28.

Section 160(e) of Title 29 of the United States Code.

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought

may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record as considered as a whole shall in like manner be conclusive."

Section 160(f) of Title 29 of the United States Code.

STATEMENT OF THE CASE

This civil action was brought on November 17, 1978, by five employees of J. P. Stevens and Company, Inc., ("Stevens") and by a non-profit corporation, The J. P. Stevens Employees Educational Committee ("Committee"), on their own behalf and on behalf of a class composed of those persons who are employees of Stevens within the bargaining unit at Roanoke Rapids, North Carolina, and who signed a petition request-

ing the decertification of the Amalgamated Clothing and Textile Workers Union ("ACTWU") as bargaining agents for Stevens employees.

The action had been brought against the National Labor Relations Board, its Chairman, Members, Executive Secretary and Regional Director for the Eleventh Region ("Board"). The Complaint sought a mandatory injunction requiring the Board to perform certain duties specifically commanded by the National Labor Relations Act, as amended, Sections 151 through 168 of Title 29 of the United States Code, ("Statute").

On January 26, 1979, the Defendants filed a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. This motion was made upon grounds that the dismissal of a decertification petition without hearing or full investigation was within the discretion of the Board and the district court lacked jurisdiction to review acts of the Board relating to the certification of unions.

On June 14, 1979, the District Court entered an order granting summary judgment dismissing this action.

On July 11, 1979, the Plaintiffs gave Notice of Appeal to the United States Court of Appeals for the Fourth Circuit.

On January 8, 1980, the Court of Appeals allowed the intervention of the Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, as a Defendant.

STATEMENT OF FACTS

On August 28, 1974, after several years of organizational efforts, the employees of Stevens at Roanoke Rapids voted to choose the Textile Workers Union, (now merged into the ACTWU) as their exclusive bargaining agent pursuant to the

provisions of 29 U.S.C. Sec. 159. This representation was certified by the Board on September 6, 1974.

Following the election, the ACTWU and Stevens began bargaining concerning the terms and conditions of the employment of the Stevens employees at Roanoke Rapids. Thereafter, on March 7, 1975, and July 30, 1975, the ACTWU entered charges that Stevens had refused to bargain in good faith, in violation of 29 U.S.C. Sec. 158(a)(5). On October 3, 1975, the ACTWU entered additional charges that Stevens had coerced one employee and discriminated against another employee at Roanoke Rapids in violation of 29 U.S.C. Sec. 158(a)(3). These cases were consolidated, and a Complaint and Notice of Hearing entered by the Board on July 1, 1976. On January 21, 1977, the ACTWU filed further charges that Stevens had refused to bargain in good faith in violation of 29 U.S.C. Sec. 158(a)(5) of the Statute. A Complaint upon this charge was entered by the Board on March 11, 1977.

The Administrative Law Judge found for the ACTWU on December 21, 1977, which finding was affirmed by the Board on December 12, 1978, 239 N.L.R.B. No. 95, 1978 CCH N.L.R.B. Para. 15,369, and enforced by the United States Court of Appeals for the Fourth Circuit. 623 F.2d 322 (4th Cir. 1980).

A second set of charges was filed on October 25, 1977, and a Complaint entered thereupon on March 22, 1978.

Soon after the filing of the refusal to bargain charges, the ACTWU initiated a public boycott of the products of Stevens, including those products manufactured at the Stevens plants in Roanoke Rapids which employ the Plaintiffs.

This boycott was the last straw for the Plaintiffs and other employees at Roanoke Rapids, who decided to "stop the boy-

cott" and get rid of the ACTWU and its planned destruction of their jobs. Upon this basis, the Plaintiffs began circulating a petition for a decertification election in October of 1976, and on November 18, 1977, filed the petition with the Board. There were approximately 2,700 employees of Stevens at Roanoke Rapids within the bargaining unit certified in 1973 by the Board, and 1,402 signatures, a majority, were accepted as valid by the Board on November 21, 1977.

Two days later, on November 23, 1977, the Assistant to the Regional Director advised the Plaintiffs that the petition would be dismissed, at which time the Plaintiffs raised the contention that the ACTWU had lost its majority status because of the boycott.

On November 25, 1977, the Plaintiffs requested in writing a hearing to determine whether the Board's blocking charge rule was applicable to the circumstances of this case. The Plaintiffs suggested that "it is the union's own activity which has undermined its status as well as other factors not attributable to the employer".

On November 29, 1977, the Defendant Johnston, Regional Director, gave the Plaintiffs written notice of his decision to dismiss the petition.

On December 9, 1977, the Plaintiffs requested review of the Regional Director's dismissal of petition.

On January 5, 1978, the Board affirmed the Regional Director.

REASONS THAT A WRIT OF CERTIORARI SHOULD BE ALLOWED

1. The question whether the rights of employees to representation of their own choosing guaranteed by the National Labor Relations Act are suspended because of misconduct by management, has not been decided by this Court.

The language of 29 U.S.C. Sections 157, and 159(c), and their legislative history are clear. The purpose of the Taft-Hartley Act was to protect the right of employees, through a free and secret ballot, to choose their own representatives for collective bargaining. All provisions of the law are subordinate to this paramount goal.

With respect to the rights of employees not to organize and to express their wishes in whatever direction through a secret ballot, Congress made it clear that it did not trust Board expertise and discretion. N.L.R.B., *Legislative History of the Labor Management Relations Act, 1947*, 318, 416.

In connection with representation proceedings the authority and discretion of the Board are confined by the language of the Statute to one question—whether the Board has statutory and constitutional authority to conduct the election ("whether a question of representation affecting [interstate] commerce exists").

Other decisions—the size and composition of the bargaining unit, the persons eligible to vote, the date of the election and the like—are incidental to this primary decision.

Disregarding the clear language of the Statute and its legislative history, the Board has articulated a "Blocking

Charge Rule" in its internal policy manual. This rule provides, in relevant part:

> "The Agency has a general policy of holding in abeyance any representation case (RM, RD, or RD) or union deauthorization case (UD) where pending unfair labor practice charges filed a party to the R or UD cases are based upon conduct of a nature which will have a tendency to interfere with the free choice of the employees in an election, were one to be conducted on the petition . . . .
>
> "8(a)(5), 8(b)(3) or 8(b)(7), such a policy also applies even where the person filing the charges is not a party to the R or UD case, and the petition may ultimately be dismissed, since the nature of the alleged violations of those sections of the Act and the remedies which could be provided therefor, might condition or preclude the existence of the question concerning representation sought to be raised by the petition (e.g., *Big Three Industries, Inc.*, 201 NLRB 197."

The policy is grounded on the discretion of the Board to determine whether "a question of representation" exists, a question which must be decided before a hearing is held. However, the real justification for this policy is the supposed effect of management misconduct upon the capability of a subsequent election to reflect accurately the true desires of employees with respect to union representation.

The Board has most often cited *N.L.R.B. v. Big Three Industries, Inc.*, 497 F.2d 43 (5th Cir. 1974), in support of the legitimacy of the Blocking Charge Rule. This opinion makes clear that the justification of the Blocking Charge Rule is not its relevance to the question of representation affecting commerce, but to the accuracy of the election as a reflection of the free choice of the workers:

> "It would be particularly anomalous, and disruptive of industrial peace, to allow the employer's wrongful refusal to bargain in good faith to dissipate the union's strength, and then to require a new election which 'would not be likely to demonstrate the employee's true, undistorted desires." 497 F.2d at 51-52.

(In *Big Three Industries*, the employee decertification petition reflected that the union had lost its majority because of dissatisfaction with the union's accomplishments, which had been directly caused by the employer's unfair labor practices.)

The judicial decisions which support the Blocking Charge Rule uniformly support this analysis, *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918 (1969); *Franks Bros. Co. v. N.L.R.B.*, 321 U.S. 702, 64 S.Ct. 817 (1944); *International Association of Machinists, etc., v. N.L.R.B.*, 311 U.S. 72, 61 S.Ct. 83 (1940); *N.L.R.B. v. Anvil Products, Inc.*, 496 F.2d 94 (5th Cir. 1974); *N.L.R.B. v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380 (2nd Cir. 1973); *N.L.R.B. v. Priced-Less Discount Foods, Inc.*, 405 F.2d 67 (6th Cir. 1968); *N. L. R. B. v. Montgomery Ward & Co.*, 399 F.2d 409 (7th Cir. 1968); *N.L.R.B. v. Universal Gear Service Corp.*, 394 F.2d 396 (6th Cir. 1968); *Furr's Inc. v. N.L.R.B.*, 350 F.2d 84 (10th Cir. 1965); *Furr's Inc. v. N.L.R.B.*, 381 F.2d 562 (10th Cir. 1967). (Those cases decided by this Court all antedate the Taft-Hartley Act which authorized employee decertification elections, and apply only to *employer* petitions.)

The regulations are also consistent with this justification for the Blocking Charge Rule and include among the matters to be investigated upon receipt of a petition for decertification, ". . . whether the election would . . . reflect the free choice of the employees in the appropriate unit, . . ." 29 C.F.R.

Sec. 101.18(a)(3). 29 C.F.R. Sec. 102.63(a) authorizes the dismissal of the petition without hearing if the regional director finds that the election would not reflect the free choice of the employees in the appropriate unit.

This justification for the blocking charge rule is entirely unconnected with the subject of investigation and determination prescribed by the statute, 29 U.S.C. Sec. 159(c), which specifically limits this investigation to the existence of a question of representation affecting commerce—a question which, in a decertification proceeding presumably must have been previously found to have existed in order to have enabled the Board to have taken jurisdiction of the original certification petition.

The language of the statute would therefore preclude the denial of decertification rights upon the basis of a policy entirely unconnected with the existence of a question of representation affecting commerce.

Only the regulations, 29 C.F.R. 101.18(a)(3), prescribe any investigation or determination of any question relevant to the Blocking Charge Rule—whether the election would "reflect the free choice of employees."

While the prevention of forgery, fraud and intimidation are inherent in the Board's duty to conduct the election, petitioners do not believe that the regulations should give legal grounds for thwarting the clear intention of Congress as expressed in the Statute. Nevertheless, the blocking charge rule is not justified even as a means to assess the ability of an election to reflect the free choice of the employees. This justification of the Blocking Charge Rule has been substantially challenged in its assumptions by legal scholars. The Board's response has been to prevent discussion and to restrict debate concerning the policy and any case in which it has been applied.

The Board bases the rationale for the Blocking Charge Rule upon the factual assumption that employees are intimidated and their free will thwarted through unfair labor practices by management, and thereby persuaded to vote against the union and thereby to dissipate the Union majority. This proposition has been challenged by Gettman, Goldberg and Herman, *Union Representation Election: Law and Realty* (Basic Books (1976)). This empirical study shows that workers are not intimidated by unfair labor practices, and, rather than being persuaded to vote *against* the union, are usually persuaded to vote *for* the union by such conduct. This study rebuts the factual assumption of the Board underlying the Blocking Charge Rule, and is recognized by all elements as original and thus far unchallenged scholarship.

The Board has never had occasion, either before or after the publication of the Gettman, Goldberg and Hermann study, to consider this position, since the Blocking Charge Rule was adopted without the benefit of contrary evidence and arguments from interested parties required by the Administrative Procedure Act. While the policy is subject to attack upon its face because of this failure by the Board, *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426 (1969), the Board's decision to adhere to the Blocking Charge Rule is also deprived of that presumption of expertise and regularity which usually attends policies adopted after the full consideration of conflicting opinions and contrary evidence which the APA procedures provide. See *Wyman-Gordon Co., supra*, 394 U.S. at 775-80 (Douglas, J. dissenting). See also, Shapiro, *The Choice of Rule-making or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965); H. Friendly, *The Federal Administrative Agencies* 45 (1962).

Since the factual basis of the Blocking Charge Rule has been rebutted by case studies and has never benefitted from

the rule-making provisions of the APA, the rule should, at the very least, be subjected to administrative scrutiny by the Board upon a full record.

Consistent with its decision to disallow any administrative scrutiny of the basis of the Blocking Charge Rule, however, the Board has refused to conduct the investigation of the facts of this case underlying the triggering of the Blocking Charge Rule which its own rules—rules promulgated under the Administrative Procedure Act—require it to make. 29 C.F.R. Sec. 101.18(a).

The Plaintiffs have sought a full investigation, particularly as to whether the petition "will effectuate the policies of the Act and reflect the free choice of the employees." Such an investigation is necessary if the Blocking Charge Rule is to be intelligently and not "mechanically" applied. Where allegations of union activity support an inference that union conduct, and not management misconduct, caused the petition, then more evidence than is contained within unfair labor practice charge files ought to be examined.

The Board makes it clear that there was no such additional evidence. The regional director's letter states:

> "The investigation reveals that there is an unfair labor practice charge pending before an Administrative Law Judge alleging the Employer [Stevens] has violated Section 8(a)(5) of the Act by refusing to bargain in good faith with its bargaining representative, *therefore no question concerning representation can exist, and*, thus the petition is dismissed." [Emphasis supplied]

The investigation ended when the files revealed the charges. No further evidence was secured or deemed relevant. The provisions of 29 C.F.R. Sec. 101.18(a)(1), (2) and (3) were simply ignored. The refusal of the Board

to follow its own rules of procedure because of its application of the Blocking Charge Rule cannot be sustained. Not only must the Board follow its own rules requiring it to conduct an investigation, *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499 (1954), but also the refusal of the Board to create a factual record has prevented a plenary determination of the factual assumptions behind the Blocking Charge Rule.

In order further to preclude review by the Board of the facts of any decertification case the Board has changed the grounds for review.

Before January 1, 1974, the Board had not found it necessary to exclude review on the basis of the factual findings of the Regional Director. At the time, the regulation merely provided that, "[t]he request [for review] . . . shall contain a complete statement setting forth facts and reasons upon which the request is based." 29 C.F.R. Sec. 102.71 (Jan. 1, 1969 Ed.); 29 F.R 15921, (Nov. 28, 1964); 39 F.R. 4080, (Feb. 1, 1974); 40 F.R. 6204, (Feb. 10, 1975).

Since the decision in *NLRB v. Bishop*, 502 F.2d 1024 (5th Cir. 1974), and *N.L.R.B. v. Big Three Industries, Inc.*, *supra*, the procedure for the review of such decisions has been substantially modified.

29 C.F.R. Sec. 102.71(b) now denies to petitioners whose decertification petitions are dismissed before hearing, because of the application of the Blocking Charge Rule, review by the Board on grounds of errors in fact-finding by the regional director.

A review of the dismissal now can only be granted on the grounds of Board policy, or arbitrary and capricious

action. The grounds for Board review prescribed in all other cases are substantially broader and include review concerning the basis of the factual findings and as to the need for a hearing to resolve the factual issues. 29 C.F.R. Sec. 102.71(a)(3) and (5). 29 C.F.R. Sec. 102.67(b).

The change in the treatment of the grounds for review in this matter make a distinction unrelated to any reasonable basis, unconnected to any legitimate goal of the Board, and conducive only to maintaining the Blocking Charge Rule with the least amount of discussion.

The Board has refused to create a record upon which the factual assumptions of the Blocking Charge Rule and its application to a specific situation can be examined because the last time the Blocking Charge Rule was fully considered upon its merits by a court, both its underlying assumptions and its applicability to the case then at bar were thoroughly demolished by an eminent, if retired, jurist.

Retired Justice Tom Clark took up this question in *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064 (5th Cir. 1971):

> "The only issue here is the arbitrary use of the blocking charge practice of the Board to hold the petition of the appellees for decertification in abeyance for over three years. Section 7 of the Act explicitly gives employees the right 'to bargain collectively through representatives of their own choosing, and *** to refrain from any or all of such activities.' 29 U.S.C. Sec. 157. In order to make certain that this right is fully protected, Congress directed the Board in mandatory language that '*whenever* a petition shall be filed' alleging that the currently recognized bargaining agent is no longer a representative of the employee

'the Board *shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall* provide for an appropriate hearing upon the due notice. *** If the Board finds *** that such a question of representation exists, it *shall* direct an election . . .' 29 U.S.C. 159(c)(1) (emphasis added [by Mr. Justice Clark]).

"We are unable to read the Court's decision in *Leedom v. Kyne, supra*, as limited to the negative command or prohibition here involved. A party is as aggrieved of the failure of the Board to exercise its statutory responsibility, as by an act of the Board contrary to an express prohibition . . . Further, the Supreme Court has not hesitated to grant relief where the Board has wrongfully and arbitrarily refused to exercise its jurisdiction . . . The fact that the Board there dismissed the complaints [in omitted described cases], where it has refused to act here, is not controlling . . . .

"The short of the matter is that the Board has refused to take any notice of the petition filed by appellees and by interposing an arbitrary blocking charge practice, applicable generally to employers, has held it in abeyance for over 3 years. As a consequence, the appellees have been deprived during all this time of their statutory right to a representative 'of their own choosing' to bargain collectively for them, 29 U.S.C. Sec. 157, despite the fact that the employees have not been charged with any wrongdoing. Such practice and result are intolerable under the Act and cannot be countenanced. 'The purpose of the Board is to protect the bargaining rights of employees, not the bargaining rights of unions' *N.L.R.B. v. Ben Duthler, Inc.*, 395 F.2d 28, 34, (6th Cir. 1968). See *N.L.R.B. v. S. S. Logan Packing Co.*, 386 F.2d 562, 564 (4th Cir. 1967). The

union cannot avoid the consequences of the loss of its majority status by the mere filing of unfair labor practice charges against the employer. Nor does the filing of such unproved charges relieve the Board of its statutory duty to consider and act on a petition for decertification. *N.L.R.B. v. Minute Maid Corp.*, 283 F.2d 705, 710 (5th Cir. 1960)

"III.

"The Board has ignored its responsibility contrary to a specific mandate of the Act and thereby worked injury to the statutory rights of the employees. The Board cites many authorities approving the use of the blocking charge practice, but none are apposite for the reason that none involve employees who are seeking an election, but rather unions or employers which have adequate avenues of review under Section 10 of the Act. A certification can be judicially reviewed under Sections 9(d) and 10 in a subsequent unfair labor practice proceeding . . . . This procedure is available to an employer by refusing to bargain with a certified representative, but it is unavailable to an unsuccessful union, and to the employees here . . . The circumstances here are thus arguably more 'exceptional' than those in *Leedom v. Kyne*, *supra*. If the association in *Kyne* bargained on behalf of the professional employees alone, ignoring the certified unit, this would violate Section 8(b)(3) and be subject to review under Section 10(f).

"Here there is no administrative remedy to correct a clear wrong that undermines the employees' paramount right . . . . The primary purpose of the Act is to protect *employee* rights. To deny to employees the right to determine whether or not they will be represented is tantamount to castrating Section 7, the heart of the Act.

"Our decision is based on the particular circumstances presented here, and we do not reach the issue of the extent to which the blocking charge might be validly applied—*e.g.*, against employers or under what circumstances the Board might justifiably exercise its discretion in refusing to process a representation petition, *Cf. Local 1545, UN. Boro. Carpenters v. Vincent*, 286 F.2d 127, 131 n. 4 (2d Cir. 1960) ('contract-bar" Rule). We only hold that, in the instant case, the Board's refusal to act is an abuse of discretion and is arbitrary." 444 F.2d 1068-79.

The statement of facts in *Templeton* show that the employer had been previously found by the Board to have coerced and restrained employees "to undermine their support of the Union" and had refused to bargain. This finding had been upheld and enforced by the Court of Appeals for the District of Columbia Circuit in *International Typographical Union, AFL-CIO v. N.L.R.B.*, 371 F.2d 347 (D.C. Cir. 1966). The union had been dissatisfied with the compliance of management with this order, and had requested the Board to file a petition for contempt, which contempt citation was still pending at the time Justice Clark wrote his decision. 444 F.2d at 1063. Such misconduct was hardly "stale", as suggested by the courts below. Justice Clark had not found delay to be a significant factor.

Justice Clark found the Blocking Charge Rule, when applied to *employee* decertification petitions, to be invalid on its face, and noted the delays and flimsy nature of the charges as egregious examples of the folly of the practice. The critical issue for Justice Clark was not delay and stale claims but was the repudiation by the Board, implicit in the Blocking Charge Rule, of the clear policy of Section 7 and the abrogation of employee rights to decertify.

The factual distinctions made between *Templeton*, and *N.L.R.B. v. Bishop*, 502 F.2d 1024 (5th Cir. 1974), and *Big Three Industries, Inc., supra*, however, are largely irrelevant to Justice Clark's reasoning. Justice Clark found the Blocking Charge Rule to be a violation of the Statute whenever it is applied to an employee petition, though he noted it might be properly used when there is an employer request for a new election. See *Franks Bros. Co. v. N.L.R.B., supra*; *International Association of Machinists v. N.L.R.B., supra*. The panel in *Bishop* avoided the reasoning in *Templeton*, and did not discuss the merits of the Blocking Charge Rule. There is no way to reconcile the legal reasoning of the courts in *Templeton* with the position of the Court in *Bishop*.

The logic of Mr. Justice Clark, expressed in *Templeton*, clearly reflects the better view: the Blocking Charge Rule, when applied to employee decertification petitions, works "injury to the statutory rights of the employees". 444 F.2d at 1069.

The refusal of the Courts below to follow the reasoning of Mr. Justice Clark, and to require the Board to exercise its purported administrative expertise in a formal fact finding procedure, makes it imperative for the Court to consider this question.

2. The decision that the district courts do not have subject matter jurisdiction under Sections 1331, 1337, and 1361 of Title 28 of the United States Code to consider acts in clear violation of the National Labor Relations Act wherein no judicial review shall otherwise be available, is in conflict with the decisions of this court.

The Plaintiffs alleged jurisdiction in the district court under Sections 1331, 1337 and 1361 of Title 28 of the United States Code.

This grant of jurisdiction under Sections 1331, 1337, and 1361 to hear and determine cases of the classes therein prescribed, is controlling unless the same has been withdrawn by the review provisions of the Statute. *Leedom v. Kyne*, 358 U.S. 184, 187, 3 L.Ed. 2d 210, 79 S.Ct. 180, 183 (1958).

29 U.S.C. Sec. 160(f) provides an avenue for judicial review by the courts of appeal of decisions of the Board under both 29 U.S.C. Sec. 160 and 29 U.S.C. Sec. 159. Under the provisions of 29 U.S.C. Sec. 159(d) the court of appeals considers and reviews the record of the certification proceeding at the time it considers a subsequent unfair labor practice charge. This review by the courts of appeal of final orders of the Board denies almost any role to the district courts and defines representation decisions as essentially interlocutory orders concerning a prerequisite question to the unfair labor practice proceeding. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 82 L.Ed. 638, 58 S.Ct. 459 (1938).

The provisions of this section provide that jurisdiction in the courts of appeals is exclusive only after a petition for enforcement or review of a Board order is properly filed.

Otherwise neither 29 U.S.C. Sec. 160 nor any other provision of the Statute withdraws jurisdiction from the district courts. It merely provides a process for the review of most grievances through an administrative body and then to the courts of appeal. Review of other grievances is neither provided nor precluded.

Four decisions have discussed this review process. *Myers*, *supra*; *AFL v. N.L.R.B.*, 308 U.S. 401, 84 L.Ed. 2d 347, 60 S.Ct. 300 (1939); *Leedom*, *supra*, and *Boire v. Greyhound Corp.*, 376 U.S. 473, 11 L.Ed.2d 849, 84 S.Ct. 894 (1964). These decisions are best analyzed by the distinction between "equitable jurisdiction" and the "power to hear and determine" jurisdiction.

With regard to the jurisdiction of federal courts, "reference to equity jurisdiction does not relate to the power of the court to hear and determine a controversy but relates to *whether it ought to assume* the jurisdiction and decide the case." *Yuba Consolidated Gold Fields v. Kilkeary*, 206 F.2d 884 (9th Cir. 1953) (Emphasis in original). Further,

> "Whether a suitor is entitled to equitable relief in federal courts, other jurisdictional requirement being satisfied, is strictly not a question of jurisdiction in the sense of power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give." *Di Giovanni v. Camden Fire Insurance Assoc.*, 296 U.S. 64, 69, 80 L.Ed. 47, 51, 56 S.Ct. 1 (1935);

See, *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979); *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977); *Atlas Life Insurance Co. v. W. I. Southern, Inc.*, 306 U.S. 563, 59 S.Ct. 657, 83 L.Ed. 987 (1939).

Using this means of analysis, the four cases consistently support the proposition that the district courts retain jurisdiction, though the other prerequisites to equitable relief—including a clear duty to act or not to act—must also be

shown. Cf. *Physician's National House Staff Association v. Fanning*, 89 L.C. 12,117, ___ F.2d ___, ___ (D.C. Cir. 1980) (Wright, C.J., dissenting).

Myers v. Bethlehem Shipbuilding Corp., supra, began as a bill in equity before the District Court of the United States for the District of Massachusetts enjoining, at the suit of the employer and others, the holding of a hearing by the Board upon an unfair labor practice complaint. A decree in equity had been granted by the district court and affirmed by the court of appeals. Mr. Justice Brandeis began the opinion of the Court:

> "The question for decision is whether a federal District Court has *equity jurisdiction* to enjoin the National Labor Relations Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices prohibited by National Labor Relations Act, ..." 303 U.S. at 43, 82 L.Ed. at 640. (Emphasis supplied)

The Court was of the opinion that since there was adequate opportunity for judicial review contained within the administrative scheme of the Statute, the district court could not properly enjoin Board action without violating the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." 303 U.S. at 50-51, 82 L.Ed. at 644, 58 S.Ct. at 463.

When *Myers, supra*, was decided, Section 16 of the Judiciary Act of 1789, (Rev. Stat. Sec. 723, 28 U.S.C. Sec. 384 (1940 ed.)) which provided that equitable relief would not be granted and that equitable jurisdiction was limited, "in any case where plain, adequate and complete remedy may be had at law," had not been repealed. See,

Oneida Indian Nations of New York State v. County of Oneida, New York, 464 F.2d 916, 922 (2d Cir. 1972). The Court merely extended the concept of an adequate "remedy at law" to include adequate administrative procedures for judicial review.

Thereafter, in *American Federation of Labor v. National Labor Relations Board*, *supra*, the Court stated the issue before it:

> "The single issue which we are now called on to decide is whether the certification by the Board is an 'order' which, by related provisions of the statute, is made reviewable upon petition to the Court of Appeals of the District or in an appropriate case to a circuit court of appeals. The question is distinct from another much argued at the Bar, whether petitioners are precluded by the provisions of the Wagner Act from maintaining an independent suit in a district court to set aside the Board's action because contrary to the statute, and because it inflicts on petitioners an actionable injury otherwise irreparable." 308 U.S. at 404-405, 84 L.Ed. at 350, 60 S.Ct. at 302.

In this same decision, the Court made clear what had not been decided in *Myers*:

> "The Board argues that the provisions of the Wagner Act, particularly Sec. 9(d), have foreclosed review of its challenged action by independent suit in the district court . . . . But that question is not presented for decision by the record before us. Its answer involves a determination whether the Wagner Act, in so far as it has given legally enforceable rights, has deprived the district courts of some portion of their original jurisdiction conferred by Sec. 24 of the Judicial Code,

> 28 U.S.C.A. Sec. 41. It can be appropriately answered only upon a showing in such a suit that unlawful action by the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record." 308 U.S. at 412, 84 L.Ed. at 354, 60 S.Ct. at 305-306. (Citations omitted.)

In *Leedom v. Kyne*, *supra*, this question finally came before the Court. In direct violation of the express command of 29 U.S.C. Sec. 159(b)(1) the Board included non-professional employees in a bargaining unit composed primarily of professional employees. Under *A.F. of L. v. N.L.R.B.*, *supra*, this decision was not reviewable by the court of appeals under the review provisions of the statute. As put by Justice Whittaker, the issue before the Court was whether ". . . the law 'apart from the review provisions of the ** Act,' afford a remedy." The resolution of this problem was found in the principle that the Court held to be controlling:

> "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control . . . ." *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 300, 64 S.Ct. 95, 97, 88 L.Ed. 61, 64, quoted at 358 U.S. at 190, 79 S.Ct. at 184.

Or putting it conversely, where there is no adequate remedy at law, there is equitable jurisdiction in the district courts to sustain an injunction.

Upon the basis of this reasoning, the jurisdiction and the injunction of the district court was affirmed.

The Court last took up the question of the jurisdiction of the district courts in *Boire v. Greyhound Corporation supra*. Here an employer sought an injunction from the district court enjoining a union election within a bargaining unit composed of the joint employees of Greyhound and its cleaning contractor. The injunction was sought on the grounds that the bargaining unit was improperly constituted, that Greyhound was not a joint employer of the cleaning crew, and that this was an error in law upon the part of the Board. The Court held that district court had no jurisdiction. Since Greyhound clearly had the opportunity, after the election, to refuse to bargain with any union chosen by that allegedly improperly constituted bargaining unit, the purportedly unlawful decision of the Board was clearly subject to quick review in the courts of appeal.

Consistent with this principle and with the distinction between jurisdiction and equitable jurisdiction, the availability of intervention by the courts must be presumed—indeed strongly presumed—unless Congress explicitly precludes such review.

This reasoning has been also articulated in circumstances divorced from the National Labor Relations Act in several opinions.

In *Abbott Laboratories, v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), the court noted that ". . . a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. 387 U.S. 136, at 140.

One of the cases cited as an authority for the preceding dicta was *Leedom v. Kyne*, *supra*.

Thereafter, in *Johnson v. Robison*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974), the Court refined this test to provide that "'clear and convincing' evidence of congressional intent [is] required . . . before a statute will be construed to restrict access to judicial review." 415 U.S. at 373-74.

Finally, in discussing Section 1331, one of the jurisdictional bases of this suit, the Court said that a recent amendment to Section 1331 had "[t]he obvious effect . . . subject only to preclusion of review statues created or retained by Congress, is to confer jurisdiction on federal courts to review agency action . . . ." *Califano v. Sanders*, 430 U.S. 99, 105, 51 L.Ed.2d 192, 97 S.Ct. 980, 984 (1977).

There is no language in the Statute or its legislative history which precludes review in this situation, or in similar situations where review of final agency action by the Board is not provided in 29 U.S.C. Sec. 160. See, *Morris v. Gressette*, 432 U.S. 491, 97 S.Ct. 2411, 53 L. Ed.2d 506 (1977); *Briscoe v. Bell*, 432 U.S. 404, 97 S.Ct. 2428, 53 L.Ed.2d 439 (1977). See also, Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953).

In addition, the opinions classically cited in support of the propriety of preclusion of review, upon examination, fail to support its denial in this case.

The last paragraph of *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 307, 64 S.Ct. 95, 100, 88 L.Ed. 61 (1943), points out that all of the Mediation Board's decisions were subject to enforcement—and, therefore, review—by the courts. See,

Brotherhood of Railway and Steamship Clerks, etc. v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 85 S.Ct. 1192, 14 L.Ed.2d 133 (1965). Similarly, the Emergency Price Control Act provided for adequate judicial review of administrative remedies. *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *Lockerty v. Phillips*, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339 (1943), as did the Selective Service Act, *Clark v. Gabriel*, 393 U.S. 256, 89 S.Ct. 424, 21 L.Ed. 418 (1968). *Lockerty* suggests that a construction of the statute which would deny all opportunity for judicial review is not to be favored. *Lockerty, supra*, 319 U.S. at 188, 63 S.Ct. at 1023.

In accordance with these decisions, *Templeton v. Dixie Color Printing Co., supra*, is the proper interpretation of both *Leedom v. Kyne, supra*, and *Boire v. Greyhound Corp., supra*. The *Templeton* decision was written by Justice Tom Clark, Retired, sitting by designation. Justice Clark was a member of the Court when both *Leedom* and *Boire* were decided. Further, Justice Clark was Attorney General of the United States at the time the Labor Management Relations Act, 1947, was adopted by Congress and vetoed by President Truman.

In *Templeton*, Justice Clark, said with regard to jurisdiction,

> "The Court has jurisdiction. Subject matter jurisdiction is confirmed by 28 U.S.C. Sec. 1337, since this is a civil action arising under an act regulating commerce. The questions are whether jurisdiction may be assumed, consistent with the review provisions of the National Labor Relations Act, . . .
>
> "It is true, as the Board contends, that generally a federal district court lacks jurisdiction to review deter-

minations of the Board in a representation proceeding. The general power of a court of appeals to review the actions of the Board is defined by Sec. 10(f), 29 U.S.C. Sec. 160(f), which is limited to final orders granting or denying relief. There is here no such order for review.

"But at least since 1940 the Supreme Court has recognized that there might be circumstances where jurisdiction was present. In *A.F. of L. v. N.L.R.B.*, . . ., it indicated that where 'unlawful action of the Board has inflicted an injury' to a right which Congress had created 'for which the law, apart from the review provisions of the . . . Act, affords a remedy' then jurisdiction would be present to enforce that right. And, again, three years later the Court warned in *Switchmen's Union v. National Mediation Board*, . . ., that where 'the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of these courts to control.' And since that time the courts in several cases have found jurisdiction present and have exercised it, notably *Leedom v. Kyne*, . . ., where the Court said that it 'cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.' There, Section 9(b)(1) of the Act had given professional employees the right to vote separately on whether they would be included in a proposed bargaining unit that included both professional and non-professional employees, but the Board refused to take a vote and included the professional employees in the unit. The Court held that a federal District Court had jurisdiction to vacate such a determination by the Board 'made in excess of its delegated powers and contrary to a specific prohibition in the Act' . . . .

"Further, federal courts have assumed jurisdiction where there was a showing that Board action violated the constitutional rights of the plaintiff. *Fay v. Douds*, 172 F.2d 720 (C.A. 2, 1949); *Milk & Ice Cream Drivers Union v. McCulloch*, . . ., 306 F.2d 763 (1962); *Leedom v. International Brotherhood of Electrical Workers*, 278 F.2d 237 (C.A.D.C. 1960).

"The foregoing cases are consistent with non-labor cases in which the Supreme Court has sustained the jurisdiction of district courts to entertain suits for relief where statutory relief against agency action was absent or inadequate. *Stark v. Wickard*, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570 (1912).

"Nor is the case of *Boire v. Greyhound Corporation*, [*supra*], to the contrary. There the Court held that *Kyne* was 'not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law'. This was in keeping with the mandate of Congress that there could be a 'review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election' . . . However, the District Court has made no plenary review of a Board order here, nor is there any claim of an erroneous assessment of the facts by the Board." 444 F.2d at 1067-68.

The courts below cite *Bishop v. N.L.R.B.*, *supra*, and *N.L.R.B. v. Big Three Industries, Inc.*, *supra*, in support of the proposition that this court lacks jurisdiction of any

sort over this action. While couched in jurisdictional language, these opinions in fact speak to "equitable jurisdiction" and remedies, and do not dispute the jurisdictional reasoning of Mr. Justice Clark in *Templeton*.

Those decisions which have upheld the scheme of review provided in 29 U.S.C. Sec. 160, have excluded district court review only because Sec. 160 provides a method of judicial review sufficient to defeat "equitable jurisdiction". They have never suggested that Congress intended to deprive federal courts of any power to review a decision not ultimately reviewable through 29 U.S.C. Sec. 160 nor have they suggested that they would uphold the validity of such a provision had they found Congress intended to enact it. *Myers*, *supra*; *AFL-CIO*, *supra*; *Leedom*, *supra*; *Boire*, *supra*.

The underlying principle implicit in these cases is that where there is an opportunity for eventual judicial review, there is "an adequate remedy at law", and the district court does not have "equity jurisdiction" (*Myers*, *supra*, at 43, at 640) to enjoin an arguably unlawful act or failure to act by the Board. The converse is equally true: Where there is no opportunity for ultimate judicial review, the court has both jurisdiction "to hear and determine" and "equity jurisdiction" to enjoin an act of the Board in clear violation of the statute. Cf. *Physician's National House Staff v. Fanning*, *supra*. (Wright, C.J., dissenting).

The decisions below disregard both this principle and the decisions from which it is derived. This has resulted in a failure by any court since *Templeton*, *supra*, to consider in a plenary fashion the propriety and legality of the Blocking Charge Rule. In order to prevent the recurrence of this error, and its intendant costs placed upon employees seeking to compel Board action not otherwise subject to correction,

this court should review the decision of the United States Court of Appeals for the Fourth Circuit.

CONCLUSION

A duty of the Board clearly required by the National Labor Relations Act—to conduct a decertification election—has been disregarded. No other means of judicial review of this final action will ever be available. If this Court does not allow review, the right of the employees to decertify will be sacrificed. A Writ of Certiorari must therefore issue.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NO. 79-1759

Gene Patterson; Dorothy France; Paula Patterson; Leonard C. Wilson; Nora W. Crouch; and J. P. Stevens Employees Educational Committee, Inc.,

Appellants,

v.

The National Labor Relations Board; John H. Fanning; Betty S. Murphy; Howard Jenkins, Jr.; John A. Penello; John C. Truesdale; William A. Lubbers; and Reed Johnston,

Appellees.

The Center on National Labor Policy, Inc.,

Amicus Curiae.

Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC,

Intervenors.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilson. Franklin T. Dupree, Jr., Chief Judge.

Appendix A

(Argued: June 5, 1980 Decided: August 4, 1980).

Before BRYAN, Senior Circuit Judge, WIDENER and HALL, Circuit Judges.

[2]

* * *

[3]

PER CURIAM:

Several individual employees of J. P. Stevens & Co., Inc., and the J. P. Stevens Employees Educational Committee, Inc., a non-profit employee organization, (appellants) seek review of an order of the United States District Court for the Eastern District of North Carolina dismissing their complaint against the National Labor Relations Board (Board). The Committee had petitioned the Regional Director of the Board on November 18, 1977, to decertify the union that had previously been designated as the exclusive bargaining representative of employees of J. P. Stevens & Co., Inc. (Stevens). The Director turned down the request, November 29, 1977, on the ground that the petition could not be considered until after the disposition of unfair labor practice charges pending against Stevens. On January 5, 1978, the Committee's appeal to the Board was disallowed.

Appellants filed a complaint with the District Court, November 17, 1978, seeking review of the Board's ruling dismissing the petition and an order compelling the Board to process the petition. On January 16, 1979, the Board moved the Court to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure for lack of jurisdiction over the

subject matter of the complaint, or, alternatively, to grant summary judgment under Rule 56. On June 13, 1979, the District Court dismissed and this appeal followed. We affirm.

[4]

On August 28, 1974, employees at Stevens' seven plants in Roanoke Rapids, North Carolina, had voted in a representation election and chosen the Textile Workers Union of America (succeeded by the Amalgamated Clothing & Textile Workers Union or ACTWU) as their exclusive bargaining representative. Throughout the ensuing years, the Union encountered difficulty in attempting to bargain with the Company which led to repeated unfair labor practice charges, some of which remain unresolved.

A series of these charges was proceeding through administrative and judicial straits when the appellants' petition to decertify the Union was put forward. Accordingly, the Regional Director and the Board refused the petition, relying on the "blocking charge" rule; under that rule, the Board holds in abeyance any union decertification effort while there are pending unfair labor practice charges based upon conduct that might interfere with the free choice of employees if an election were held. The rule has long been invoked by the Board with court approval. E.g., National Labor Relations Board v. Big Three Industries, 497 F.2d 43, 53-54 (5th Cir. 1974).

In declining to set aside the Board's implementation of the blocking charge rule or to force review of the appellants' decertification petition, the trial court relied on Bishop v. National Labor Relations Board, 502 F.2d 1024 (5th Cir. 1974). The Court emphasized Bishop's holding that a Federal District Court was without subject matter jurisdic-

[5]

tion over the Board's exercise of the blocking charge rule because Congress has dictated that the National Labor Relations Board, and not the courts, is to be the umpire in decertification disputes, and because District Court review would frustrate "our finely-tuned system of collective bargaining." 502 F.2d at 1027. Acknowledging that exceptions to this policy of abstention exist, the District Court concluded that they did not apply in this case because: (1) the Board was not acting clearly in excess of its delegated powers, *see Leedom v. Kyne*, 358 U.S. 184, 188 (1958); (2) The Board did not apply the blocking charge rule mechanistically without considering the circumstances; and (3) the unfair labor practice proceedings had not been pending so long as to be stale, *see Surratt v. National Labor Relations Board*, 463 F.2d 378 (5th Cir. 1972); *Templeton v. Dixie Color Printing Company*, 444 F.2d 1064 (5th Cir. 1971).

Initially appellants would put the District Court in error for dismissing the action without first holding a hearing or ruling on appellants' discovery motions. Additionally, they assail the Court's finding of want of jurisdiction over the subject matter of their complaint. The record, however, evinces no procedural mistake in the Court's dismissal of the complaint. Although its order refers to a "summary judgment dismissing the action," it is clear that the Court's decree was in actuality a dismissal for lack of subject

[6]

matter jurisdiction under Rule 12(b)(1). Thus, there is no force in appellants' criticism that the Court disregarded the procedural prerequisites of Rule 56. Moreover, the

District Court accurately adjudged that, in applying the blocking charge tactic in this case, the Board neither exceeded its authority nor ignored any statutory exaction; rather, its call upon the rule was an exercise of the discretion delegated to the Board by Congress.

In fine, we affirm throughout on the District Judge's opinion. *Patterson v. N.L.R.B.*, No. 78-74 CIV-8 (E.D.N.C. June 13, 1979).

Affirmed.

APPENDIX B

In The
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

GENE PATTERSON, et al, *Plaintiffs*,	)	
	)	NO. 78-74-CIV-8
vs.	)	
	)	ORDER
THE NATIONAL LABOR RELATIONS BOARD, et al., *Defendants*.	)	

Plaintiffs bring this action seeking review of a decision by the National Labor Relations Board (NLRB) dismissing the action for lack of subject matter jurisdiction.

The NLRB conducted a representation election among the production and maintenance employees at J. P. Stevens & Company, Inc. (J. P. Stevens) at its seven plants in Roanoke Rapids, North Carolina, on August 28, 1974. A majority of the employees voted for the Textile Workers Union of America to be their exclusive bargaining agent. The Union was subsequently succeeded by the Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC (ACTWU). The NLRB certified the ACTWU as the exclusive bargaining representative of the J. P. Stevens' employees on September 6, 1974. Since that time the Union has sought to bargain collectively with J. P. Stevens with respect to rate of pay, wages, hours, etc.

Over the next thirteen months the Union filed a series of unfair labor practices with the NLRB's Regional 11 office. Additional complaints regarding J. P. Stevens' alleged unfair labor practices have been filed as late as March 22, 1978. An administrative law judge ruled on December 21, 1977 that J. P. Stevens had violated various provisions of the National Labor Relations Act. The decision of the administrative law judge was affirmed by the NLRB on December 12, 1978. *J. P. Stevens & Company, Inc.*, 237 NLRB No. 95. The case is now on appeal before the Fourth Circuit (No. 78-1879). Plaintiffs state that no negotiations between the Union and Stevens are being held.

Prior to the administrative law judge's ruling, however, plaintiffs filed a petition with the Regional Director of the NLRB seeking to decertify the Union on the ground that a substantial number of employees no longer wished the Union to be their representative due to the Union's advocacy of boycotting products manufactured by J. P. Stevens. Applying the long-standing "blocking charge" rule,[1] the NLRB dismissed the decertification petition, finding that unfair labor practice complaints against J. P. Stevens were pending and therefore a question concerning representation could not appropriately be raised. The plaintiffs seek review of the NLRB's dismissal of the decertification petition.

The court concludes that this case is controlled by *Bishop v. NLRB*, 502 F.2d 1024 (5th Cir. 1974). Emphasizing that Congress has determined that the NLRB, and not the

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[1] The NLRB has a general policy of holding in abeyance any union decertification case where pending unfair labor practice charges filed by the union are based upon conduct of a nature which would have a tendency to interfere with the free choice of the employees in an election, were one to be conducted on the petition. This policy has been dubbed the "blocking charge" rule and has been employed by the NLRB since 1937 with court approval. See NLRB Field Manual Para. 11730; **NLRB v. Big Three Industries, Inc.**, 497 F.2d 43 (5th Cir. 1974).

courts, is to be the umpire in decertification disputes, *Bishop* held that a federal district court has no subject matter jurisdiction over an NLRB exercise of the blocking charge rule when dismissing a decertification petition. The rationale is that review by a federal district court of NLRB certification decisions would frustrate and circumvent "our finely-tuned system of collective bargaining." *Id.*, 502 F.2d at 1027.

The plaintiffs argue, however, that an exception exists to the general rule of non-reviewability when the NLRB has "clearly acted in excess of its delegated powers and contrary to a specific prohibition in the Act." *Leedom v. Kyne*, 358 U.S. 184, 188 (1958). But here the NLRB has not acted beyond its delegated powers; rather, it has exercised discretion specifically entrusted to it by the Congress and the courts. *Bishop, supra*. While it is true that the Fifth Circuit has allowed federal district court review of decertification decisions in *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064 (5th Cir. 1971), and *Surratt v. NLRB*, 463 F.2d 378 (5th Cir. 1972), such review occurred in two carefully limited situations: (1) where the NLRB applied the blocking charge rule with a mechanistic *per se* approach; and (2) when NLRB unfair labor practice proceedings had been pending for so long that they had become stale. Neither of the two exceptions is present in the instant case. First, the unfair labor practice proceedings lodged against J. P. Stevens are active and ongoing. An administrative law judge found that J. P. Stevens was acting in violation of the National Labor Relations Act on December 21, 1977, less than a year before the instant complaint was filed. Further complaints regarding J. P. Stevens' alleged unfair labor practices were filed as recently as March 22, 1978. Secondly, the NLRB did not mechanis-

tically apply the blocking charge rule, but rather, considered the history of the outstanding unfair labor practice complaints against J. P. Stevens as well as a letter by plaintiffs' counsel stating his clients' position. The failure of the NLRB to conduct a hearing on the decertification petition does not conclusively show a *per se* mechanistic approach.

Accordingly, defendants' motion for summary judgment dismissing the action is granted and the action is dismissed.

SO ORDERED.

/s/ F. T. DUPREE, JR.
F. T. Dupree, Jr.
United States District Judge

June 13, 1979.

No. 80-993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENE PATTERSON, *et al.*, and J. P. STEVENS EMPLOYEES EDUCATION COMMITTEE, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*, and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MEMORANDUM FOR THE RESPONDENT UNION IN OPPOSITION

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80

TABLE OF CONTENTS

	Page
REASONS FOR DENYING THE WRIT	1
I. There Is No Conflict Among The Circuits Or Other Justification For Review By This Court..	1
II. The Petition Is In Material Noncompliance With The Rules of This Court	4
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:

Bishop v. N.L.R.B., 502 F.2d 1042 (C.A. 5)	2, 3
Franks Bros. v. Labor Board, 321 U.S. 702	4
Leedom v. Kyne, 358 U.S. 184	2, 5
N.L.R.B. v. Big Three Industries, Inc., 497 F.2d 43 (C.A. 5)	2, 3
Physicians National House Staff Association v. Fanning, —— F.2d ——, 104 LRRM 2940 (C.A. D.C. en banc), *cert. denied*, 49 U.S.L.Wk. 3617 (Feb. 23, 1981)	4
Surratt v. N.L.R.B., 463 F.2d 378 (C.A. 5)	2, 3
Templeton v. Dixie Color Printing Co., 444 F.2d 1064 (C.A. 5)	2, 3

STATUTES:

Judicial Code:	
28 U.S.C. § 1331	4
28 U.S.C. § 1337	4
28 U.S.C. § 1361	4
National Labor Relations Act, as amended, 49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 141 *et seq.*:	
§ 8	4
§ 9	2
§ 9(c)	6

TABLE OF AUTHORITIES—Continued

	Page
§ 9(c)(1)	6
§ 9(c)(1)(A)	5, 6, 7
§ 10	4

RULES:

Rules of the Supreme Court of the United States (1980):

21	7
21.1(a)	4
21.1(k)(ii)	4
21.5	7

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MEMORANDUM FOR THE RESPONDENT UNION IN OPPOSITION

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Circuits Or Other Justification For Review By This Court.

A. The decision below is an entirely routine and correct application of Congress' restriction of the jurisdiction of the federal district courts to review the actions of the National Labor Relations Board in proceedings under

§ 9 of the National Labor Relations Act ("NLRA"). Petitioners' effort to bring themselves within the carefully drawn and deliberately narrow exception of *Leedom* v. *Kyne*, 358 U.S. 184, is wholly without merit, as both courts below recognized (Pet. 36-37; 40-42).[1] Nowhere in the lengthy and tendentious petition is there any demonstration that the Board "has clearly acted in excess of its delegated powers and contrary to a specific prohibition in the Act", which is the prerequisite for jurisdiction under *Kyne*, *id.* at 188.

In attacking the Board's long-settled "blocking charge" rule, petitioners attempt to contrive a conflict between the decision below and two decisions of the Fifth Circuit, *Templeton* v. *Dixie Color Printing Co.*, 444 F.2d 1064 (C.A. 5) and *Surratt* v. *N.L.R.B.*, 463 F.2d 378 (C.A. 5). See particularly the extensive quotations from *Templeton* at Pet. 17-20; 29-32. However, as the Fifth Circuit itself subsequently explained, the *Templeton* and *Surratt* cases turned on their own special facts, namely, that the underlying unfair labor practice proceedings which had blocked the representation petition had been pending so long that they were stale; accordingly the Fifth Circuit itself refused to hold the "blocking charge" rule to be illegal *per se* and subject to review by the district courts in a *Leedom* v. *Kyne* action. *Bishop* v. *N.L.R.B.*, 502 F.2d 1024, 1030-1032.[2] (C.A. 5).

Indeed, the *Bishop* court approved the "blocking charge" rule, saying in part:

> If the employer has in fact committed unfair labor practices and has thereby succeeded in undermining union sentiment, it would surely controvert the spirit of the Act to allow the employer to profit by

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[1] "Pet." refers to the Petition for Certiorari.

[2] *Templeton* and *Surratt* were described as "a very limited exception to the general rule of review of representation questions". (*Id.* at 1032).

his own wrongdoing. In the absence of the "blocking charge" rule, many of the NLRB's sanctions against employers who are guilty of misconduct would lose all meaning. Nothing would be more pitiful than a bargaining order where there is no longer a union with which to bargain.

Nor is the situation necessarily different where the decertification petition is submitted by employees instead of the employer or a rival union. Where a majority of the employees in a unit genuinely desire to rid themselves of the certified union, this desire may well be the result of the employer's unfair labor practices. In such a case, the employer's conduct may have so affected employee attitudes as to make a fair election impossible.

In the present case, the courts below unanimously held that the present case on its facts was like *Bishop*, and did did not come within the "carefully circumscribed jurisdiction" asserted in *Templeton* and *Surratt* (Pet. 37, 41). Because the National Labor Relations Board in its Brief in Opposition will undoubtedly discuss the nature of the "blocking charge" rule and details of this and the Fifth Circuit cases at greater length, we will not burden the Court with duplicative discussion.[3] It suffices to say,

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[3] Petitioner's objection to the fairness of any delay on processing their decertification petition has also been well answered by the Fifth Circuit:

> It would be particularly anomalous, and disruptive of industrial peace, to allow the employer's wrongful refusal to bargain in good faith to dissipate the union's strength, and then to require a new election which "would not be likely to demonstrate the employees' true, undistorted desires," *N.L.R.B.* v. *Gissel Packing Co.*, 1969, 395 U.S. 575, 611-612, n. 33, since employee disaffection with the union in such cases is in all likelihood prompted by the employer-induced failure to achieve desired results at the bargaining table. * * * By skillful maneuvering, the employer has sapped union sentiments and relegated the union to minority status. [*N.L.R.B.* v. *Big Three*

and the opinions below show, that the Fourth and Fifth Circuits are not in conflict on this issue, but in agreement with each other and the precedents of this Court.

B. Petitioners advance also the more ambitious argument that the federal courts should have jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1361 to consider any otherwise unreviewable action in a representation case before the National Labor Relations Board. See particularly Pet. 28-33. That position, which would simply reverse the procedural scheme of §§ 8, 9 and 10 of the Act, has not been accepted by any appellate court. Significantly, petitioners find it necessary in support of their argument to cite the *dissenting* opinion of Circuit Judge J. Skelly Wright in *Physicians National House Staff Association* v. *Fanning*, —— F.2d ——, 104 LRRM 2940, 2945 (C.A. D.C. *en banc*) (Pet. 24, 32). The Physicians National House Staff Association sought review of this precise issue in No. 80-933, but this Court denied certiorari on February 23, 1981, 49 U.S. L.Wk. 3617. Accordingly, we regard it as unnecessary to comment any further on this issue.

II. The Petition Is In Material Noncompliance With The Rules Of This Court.

A. The Questions Presented are set forth in the Petition in a manner which honor Rule 21.1(a) of this Court in the breach rather than the observance. The express admonition that the "statement of questions * * * should not be argumentative" is flatly defied. Indeed, the "Questions Presented" are put in declaratory form—rather than in the form of questions—so that the Court is not

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Industries, Inc., 497 F.2d 43, 51-52.] See also *id.* at 52-53, discussing *Franks Bros.* v. *Labor Board*, 321 U.S. 702.

The foregoing takes on special force given the lengthy history of obstinate flouting of the NLRA, and employee rights to organize and bargain collectively thereunder, by the particular employer involved here—J. P. Stevens, Inc.

advised, but is compelled to infer, just what questions are sought to be presented. The argumentative character of the "Questions Presented" is further evidenced by the fact that they are repeated *in haec verba* as the topic headings of the Argument (Pet. 10, 21).

B. Rule 21.1(k)(ii) provides:

> Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency and the title and number of the case, and the date of its entry.

This material is omitted entirely from the Petition even though this is an action brought to challenge and set aside an action of an administrative agency, here the NLRB and its Regional Director. References to these opinions, orders, etc., are most emphatically necessary to ascertain the grounds of the challenged decision. It would probably suffice to say that on this point the proposition is intuitively obvious, and that the standard of *Leedom* v. *Kyne*, *supra*, requires a showing which can, in any case, be satisfied only if the Court has before it the precise basis of the Board's action. But petitioners' omission is even more significant because the omitted documents reveal that petitioners actually received the entire relief which they claimed before the Board, so that their present action (and *a fortiori* their petition for *certiorari*) is for that additional reason wholly devoid of merit, if indeed it presents a case or controversy within the Article III jurisdiction of this Court and the courts below.

In considering this point it will be most convenient to track the requirements of § 9(c)(1)(A), the prohibitions of which were allegedly flouted by the Board.

First, as to the investigation of the representation petition itself, the Board did precisely what the Act commands it to do. The Board did not dismiss the petition out of hand. Rather, Exhibit B to the Complaint in this action shows that the Board carefully investigated the petition for compliance with the Board's rules, and investigated the signatures accompanying the petition to determine whether a showing of interest had been made. The Regional Director wrote to petitioners' counsel:

> The [petition] . . . has been assigned to an agent who will contact you in the near future.
>
> We acknowledge receipt of *1406 signatures . . .
>
> Enclosed are two copies of a Notice of Employees which the employer has been requested to post.
>
> * * * * *

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* 23 signatures are undated and, by ruling of the Board, cannot be considered as evidence of interest.

No fuller investigation could have been conducted. The Board obviously examined each and every signature, sent petitioners a notice to be posted by the employer and effectively advised them that the petition would be further processed for determining whether there was reasonable cause to believe that a question of representation exists. The investigation prong of the complaint, therefore, presents no live dispute since petitioners secured all of the relief contemplated by § 9(c).

Second, as to determining the possible existence of a question of representation, the Board likewise did all that the Act prescribes. Section 9(c)(1)(A) strictly limits the Board's duty to (i) determining ". . . if it has reasonable cause to believe that a question of representation affecting commerce exists," and (ii) providing for an appropriate hearing on the question of representation only after it has found such reasonable cause. The record

unequivocally shows that the Board acted in strict accord with § 9(c)(1). As shown above, the Regional Director advised plaintiffs' counsel on November 29, 1977 that the petition "has been carefully investigated and considered" and that no question concerning representation can exist because the "investigation reveals that there is an unfair labor practice charge pending before an Administrative Law Judge". Petitioners thus obtained precisely what the statute grants them—a determination whether there is reasonable cause to believe that a question of representation exists. The Board made that determination after careful investigation and consideration, and plaintiffs' complaint properly requests nothing more.

The third substantive request for relief—a hearing concerning the question of representation—was contingent upon a finding of reasonable cause, just as the statute requires. Since there was a determination that no reasonable cause exists, the condition was not satisfied and the hearing provision did not come into play.

In short, if the Board's rulings had been reproduced as Rule 21 requires that they be, it would be evident that the Board did everything it was called upon to do, not only by the statute, but by petitioners' own submissions before the Board, where they sought to formulate their demands for relief according to § 9(c)(1)(A). It was not until they brought their complaint in the District Court to challenge the "blocking charge" rule that they reframed the issue in a manner which brought them beyond not only the statute but their prior prayers for relief at the Board. Thus, even if there were any substance to the contention that an unfair labor practice should not block a representation petition, the petitioners would be entitled to no judicial relief since they received from the Board everything for which they had asked.

C. Rule 21.5 of this Court provides:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

No comment on our part is necessary to demonstrate that this Rule provides yet another reason for denying the Petition.

CONCLUSION

For the foregoing reasons and those stated in the Brief in Opposition of the National Labor Relations Board, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 80-993

In the Supreme Court of the United States

OCTOBER TERM, 1980

GENE PATTERSON, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-993

GENE PATTERSON, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the district court lacked jurisdiction to review the Board's dismissal of an employee petition to decertify the incumbent union representative where the Board had determined that there were outstanding unfair labor practice complaints against the employer that precluded the holding of an election at that time.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 12

TABLE OF AUTHORITIES

Cases:

American Federation of Labor v. *NLRB*, 308 U.S. 401 ..... 5, 6

Bishop v. *NLRB*, 502 F. 2d 1024 ..... 10, 11

Boire v. *Greyhound Corp.*, 376 U.S. 473 ..... 5, 8

Brooks v. *NLRB*, 348 U.S. 96 10

Brotherhood of Railway & Steamship Clerks v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 8

Califano v. *Sanders*, 430 U.S. 99 8

Franks Bros. Co. v. *NLRB*, 321 U.S. 702 9

Furr's, Inc. v. *NLRB*, 350 F. 2d 84 ..... 9, 10

J.P. Stevens & Co., 239 N.L.R.B. 738, enforced, 623 F. 2d 322 4

J.P. Stevens Employees Educational Committee v. *NLRB*, 582 F. 2d 326 11

Lawrence Typographical Union v. *McCulloch*, 349 F. 2d 704 9

PREVIOUS PAGE WAS BLANK

Page

Cases—(Continued):

Leedom v. *Kyne*, 358 U.S. 184 ..... 6, 7

Madden v. *Brotherhood*, 147 F. 2d 439 6

May Department Stores Co. v. *NLRB*, 326 U.S. 376 5

Modern Plastics Corp. v. *McCulloch*, 400 F. 2d 14 9

Morris v. *Gressette*, 432 U.S. 491 6

NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 10

NLRB v. *Big Three Industries, Inc.*, 497 F. 2d 43 10

NLRB v. *Gissel Packing Co.*, 395 U.S. 575 9

NLRB v. *Wyman-Gordon Co.*, 394 U.S. 759 10

Panama Canal Co. v. *Grace Line, Inc.*, 356 U.S. 309 6

Physicians National House Staff Ass'n v. *Murphy*, cert. denied, No. 80-933 (Feb. 23, 1981) 5

Raynal Plymouth Co., 175 N.L.R.B. 527 9-10

Schilling v. *Rogers*, 363 U.S. 666 6

Surprenant Mfg. Co. v. *Alpert*, 318 F. 2d 396 ..... 9, 10

Surratt v. *NLRB*, 463 F. 2d 378 11

Page

Cases—(Continued):

Switchmen's Union of North America v. *National Mediation Board*, 320 U.S. 297 6

Templeton v. *Dixie Color Printing Co.*, 444 F. 2d 1064 10

Statute and rules:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

Section 8(a)(1), 29 U.S.C. 158(a)(1) 4

Section 8(a)(5), 29 U.S.C. 158(a)(5) 4

Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) 11

Section 8(b)(1)(B), 29 U.S.C. 158(b)(1)(B) 11

Section 9(b)(1), 29 U.S.C. 159(b)(1) 7

Section 9(c), 29 U.S.C. 159(c) 8-9

Section 9(c)(1), 29 U.S.C. 159(c)(1) 8-9, 10

Section 9(d), 29 U.S.C. 159(d) 5, 7

Section 10(e), 29 U.S.C. 160(e) 5, 8

Section 10(f), 29 U.S.C. 160(f) 5, 8

28 U.S.C. 1331 8

Fed. R. Civ. P. :

Rule 12 4

Rule 56 4

Page

Miscellaneous:

Hearings on S. 1000, etc., Before the Senate Comm. on Education and Labor, 76th Cong., 1st Sess., Pt. 1 (1939) 6

H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947) 7

H. R. Rep. No. 245, 80th Cong., 1st Sess. (1947) 6-7

H. R. Rep. No. 1147, 74th Cong., 1st Sess. (1935) 6

1 *Legislative History of the Labor Management Relations Act of 1947 (1948):* 7

2 Legislative History of the National Labor Relations Act of 1935 (1949) 6

National Labor Relations Board Casehandling Manual (Part Two) Representation Proceedings (1975) 3

S. Rep. No. 573, 74th Cong., 1st Sess. (1935) 6

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34-38) is noted at 626 F. 2d 862 (table). The memorandum opinion of the district court (Pet. App. 39-42) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1980. On October 21, 1980, the Chief Justice granted an extension of time in which to file a petition for a writ of certiorari to and including December 17, 1980, and the petition was filed on December 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 28, 1974, the Board conducted a representation election among the production and maintenance employees of J.P. Stevens & Co. ("the Company"), at its seven plants in Roanoke Rapids, North Carolina. A majority of the employees voted for the Union,[1] and on September 6, 1974, the Board certified the Union as the exclusive bargaining representative of the unit employees.

On March 7, July 30, and October 3, 1975, the Union filed unfair labor practice charges with the Board's Regional Office, alleging in part that the Company had refused to bargain with the Union by making unilateral changes in wages and terms and conditions of employment (A. 21-23).[2] On June 1, 1976, following investigation of these charges, the General Counsel of the Board issued three complaints charging the Company with violating the Act by negotiating with the Union in bad faith and with no intent to reach

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[1]Textile Workers Union of America, subsequently succeeded by the Amalgamated Clothing & Textile Workers Union, AFL-CIO, CLC.

[2]"A." refers to the appendix to the briefs in the court of appeals. References to the record herein are taken from the Board's brief in the court of appeals.

an agreement; unilaterally changing policies governing wages and terms and conditions of employment; refusing to furnish information requested by the Union for use in performing the Union's collective bargaining responsibilities; threatening employees; and discharging an employee because of her union activity (A. 24-31). The complaints were consolidated and a hearing was conducted before an Administrative Law Judge between December 1976 and April 1977. After the hearing commenced, the Union filed an additional charge, and the General Counsel issued another complaint that was consolidated with the pending complaints (A. 32-36).[3]

On November 18, 1977, subsequent to the hearing on the consolidated complaints, petitioners filed a petition with the Regional Director seeking to decertify the Union on the ground that a substantial number of unit employees no longer wished the Union to be their representative (A. 18A). On November 29, 1977, the Regional Director dismissed the decertification petition because, as stated in a letter to petitioners (A. 18G):

> The investigation reveals that there is an unfair labor practice charge pending before an Administrative Law Judge alleging the Employer has violated Section 8(a)(5) of the Act by refusing to bargain in good faith with its bargaining representative, therefore, no question concerning representation can exist and thus, the

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[3]The Union filed additional unfair labor practice charges against the Company on October 25, 1977, alleging further refusals to bargain by the Company. The General Counsel issued a complaint based on this charge, as amended, on March 22, 1978 (A. 38-41).

> petition is dismissed. This case is subject to reinstatement, if appropriate, upon application by the Petitioner, after disposition of the unfair labor practice proceeding.[4]

Petitioners appealed the Regional Director's decision to the Board, which, on January 5, 1978, denied the appeal.[5]

On November 14, 1978, petitioners filed the present suit in the United States District Court for the Eastern District of North Carolina, seeking review of the Board's ruling dismissing the decertification petition and an order compelling the Board to process the petition. The Board moved

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[4]The "blocking charge" policy, pursuant to which the Regional Director acted, is set forth in the National Labor Relations Board Casehandling Manual (Part Two) Representation Proceedings (1975), which states in relevant part:

> 11730 Concurrent R and C Cases
>
> The Agency has a general policy of holding in abeyance any representation case (RM, RC, or RD) or union deauthorization cases (UD) where pending unfair labor practice charges filed by a party to the R or UD cases are based upon conduct of a nature which would have a tendency to interfere with the free choice of the employees in an election, were one to be conducted on the petition (e.g., *United States Coal & Coke Company*, 3 NLRB 398, 399; *Carson Pirie Scott & Company*, 69 NLRB 935, 938-939; *Columbia Pictures Corporation, et al.*, 81 NLRB 1313, 1314; see also *Holt Bros.*, 146 NLRB 383, 384).
>
> Where the pending charges allege violations of 8(a)(2), 8(a)(5), 8(b)(3), or 8(b)(7), such a policy also applies even where the person filing the charges is not a party to the R or UD case, and the petition may ultimately be dismissed, since the nature of the alleged violations of those sections of the Act and the remedies which could be provided therefor, might condition or preclude the existence of the question concerning representation sought to be raised by the petition (e.g., *Big Three Industries, Inc.*, 201 NLRB 197). * * *

[5]On December 21, 1977, while the appeal was pending, the Administrative Law Judge issued a decision in the consolidated unfair labor practice cases finding that, since October 31, 1974, the Company had

to dismiss under Fed. R. Civ. P. 12 on the grounds that the district court did not have jurisdiction over the subject matter of the suit and that the complaint failed to state a claim upon which relief could be granted. Alternatively, pursuant to Fed. R. Civ. P. 56, the Board moved for summary judgment. The district court dismissed the complaint (Pet. App. 39-42), holding that a federal district court has no subject-matter jurisdiction over a Board dismissal of a decertification petition based upon outstanding unfair labor practice complaints. The court found that the Board "has not acted beyond its delegated powers; rather, it has exercised discretion specifically entrusted to it * * *[and has not] applied the blocking charge rule with a mechanistic *per se* approach" (*id.* at 41).

The court of appeals, in a *per curiam* opinion (Pet. App. 34-38), affirmed the district court's dismissal of the complaint for lack of jurisdiction. The court stated (*id.* at 38) that the

> District Court accurately adjudged that [in dismissing the petition because of the pending unfair labor practice charges] in this case, the Board neither exceeded

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refused to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act. The ALJ further found that the Company violated Section 8(a)(5) and (1) of the Act by making unilateral changes in terms and conditions of employment and by refusing to furnish relevant information requested by the Union. The ALJ issued a recommended order requiring the Company to bargain with the Union in good faith and deeming the Union's certification as commencing on the date the Company began bargaining in good faith.

The Board issued its Decision and Order affirming the ALJ's findings, conclusions, and order on December 12, 1978. *J. P. Stevens & Co.*, 239 N.L.R.B. 738. The court of appeals enforced the Board's order in relevant part on June 11, 1980. *J. P. Stevens & Co.*, v. *NLRB*, 623 F. 2d 322 (4th Cir. 1980).

its authority nor ignored any statutory exaction; rather, its [action] * * * was an exercise of the discretion delegated to the Board by Congress.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or the law in any other circuit. Accordingly, further review is unwarranted.

1. Petitioners argue (Pet. 22-23) that the district courts have jurisdiction to review Board representation decisions that do not result in unfair labor practice proceedings reviewable in the courts of appeals. This contention is without merit.[6]

The National Labor Relations Act does not provide for direct review of Board determinations in representation proceedings, but permits review of such determinations only to the extent authorized by Section 9(d) of the Act, 29 U.S.C. 159(d), *i.e.*, when they form the basis for a final order issued in an unfair labor practice proceeding and that order is before the court of appeals for enforcement or review under Section 10(e) or (f) of the Act, 29 U.S.C. 160(e) or (f). See *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 409 (1940); *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964); *May Department Stores Co.* v. *NLRB*, 326 U.S. 376, 379 (1945). The rule that a representation determination is not reviewable unless it "eventuates in a finding by the Board that an unfair labor practice has been committed * * *" (*Boire* v. *Greyhound Corp., supra*, 376 U.S. at 477) is more than a requirement that a party to a representation proceeding exhaust its administrative remedies before seeking judicial review. It reflects a policy

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[6]On February 23, 1981, this Court denied certiorari in a case presenting a similar claim. *Physicians National House Staff Ass'n* v. *Murphy*, No. 80-933.

choice by Congress to provide solely for *administrative* resolution of representation questions that do not ultimately result in an unfair labor practice proceeding.[7]

The legislative history of the Wagner Act of 1935 discloses that Congress, after balancing the advantages of permitting direct review of Board representation determinations against the disadvantages—especially the likelihood that direct review would result in dilatory tactics in representation proceedings—deliberately decided to preclude such review.[8] In 1939, Congress was asked to reconsider the question of direct review of Board representation determinations and declined to change the limited review provisions of the Wagner Act.[9]

The problem was again considered by Congress in 1947 when it enacted the Taft-Hartley amendments to the Act. Section 10(f) of the House bill, following the 1939 proposal, provided for direct review by the courts of appeals of Board certifications. H.R. Rep. No. 245, 80th Cong., 1st Sess. 43,

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[7]There is no doubt that Congress has the power to prescribe an administrative remedy to the exclusion of a judicial one. See *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 301 (1943) ("All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced"). See also *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977); *Schilling* v. *Rogers*, 363 U.S. 666, 674 (1960); *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318-319 (1958).

[8]See S. Rep. No. 573, 74th Cong., 1st Sess. 5-6 (1935), reproduced in 2 *Legislative History of the National Labor Relations Act of 1935*, at 2305 (1949) (hereinafter referred to as "2 *Leg. Hist.*"). See also H.R. Rep. No. 1147, 74th Cong., 1st Sess. 7 (1935); 2 *Leg. Hist., supra*, at 3053. See generally *Leedom* v. *Kyne*, 358 U.S. 184, 191-197 (1958) (Brennan, J., dissenting).

[9]See *Hearings on S. 1000, etc., Before the Senate Comm. on Education and Labor*, 76th Cong., 1st Sess., Pt. 1, 460-463, 584-585 (1939); *American Federation of Labor* v. *NLRB*, *supra*, 308 U.S. at 409-411; *Madden* v. *Brotherhood*, 147 F. 2d 439, 443-445 (4th Cir. 1945).

59-60 (1947), 1 *Legislative History of the Labor Management Relations Act of 1947*, at 334, 350-351 (1948) (hereinafter referred to as "*1 Leg. Hist.*"). The House Report accompanying the bill explained that such an amendment was desirable because, *inter alia*, the Act as then structured was unfair to "the union that loses, which has no appeal at all no matter how wrong the certification may be." H.R. Rep. No. 245, *supra*, at 43, 1 *Leg. Hist., supra*, at 334. In conference, this provision was eliminated, and Congress decided to retain the limited review provided in Section 9(d) of the original Act. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 56-57 (1947), 1 *Leg. Hist., supra*, at 560-561.

2. There is also no merit in petitioners' additional contention (Pet. 19-20) that the jurisdiction of the district court in this case can be sustained under *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

a. In *Leedom* v. *Kyne*, this Court carved out a limited exception to the general rule of nonreviewability of representation proceedings. There, jurisdiction of the district court was found to exist where the Board directed an election in an admittedly mixed bargaining unit of professional and non-professional employees without first having "a majority of such professional employees vote for inclusion in such unit" as expressly required by Section 9(b)(1) of the Act, 29 U.S.C. 159(b)(1). This Court explained that the district court had jurisdiction because the Board had acted in violation of a "clear and mandatory" provision of the statute, thereby depriving the professional employees of a right guaranteed them by the Act for which there was no other remedy. 358 U.S. at 190-191.

The Court has made clear that district court jurisdiction is narrowly confined to the situation where the Board acts in violation of a specific mandate of the Act and does not

extend to an action seeking review of discretionary determinations. Thus, as the Court emphasized in *Boire* v. *Greyhound Corp., supra*, 376 U.S. at 481:

> The *Kyne* exception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law. Judicial review in such a situation has been limited by Congress to the courts of appeals, and then only under the conditions explicitly laid down in § 9(d) of the Act.

See also *Brotherhood of Railway & Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 659-660 (1965).[10]

b. The Board did not violate a clear statutory mandate or otherwise exceed its statutory authority in dismissing the petition here pursuant to its "blocking charge" policy (see page 3 note 4, *supra*). Under Section 9(c) of the Act,[11]

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[10]Petitioners incorrectly rely (Pet. 28) on *Califano* v. *Sanders*, 430 U.S. 99 (1977), to support their contention that the district court had jurisdiction under 28 U.S.C. 1331. In that case, this Court recognized that the grant of jurisdiction to federal courts to review agency action under Section 1331 is "subject * * * to preclusion-of-review statutes created * * * by Congress" (430 U.S. at 105). As shown above, the manifest intent of Congress, from the time of enactment of the Wagner Act to the present, has been to preclude judicial review of Board representation determinations unless they form the basis of a final order issued in an unfair labor practice proceeding, which is reviewable in the courts of appeals under Section 10(e) and (f) of the Act; thus, the Act precludes district court jurisdiction under Section 1331.

[11]Section 9(c)(1) provides in pertinent part (emphasis added):

> Whenever a petition shall have been filed * * * the Board shall investigate such petition and *if it has reasonable cause to believe that a question of representation affecting commerce exists* shall provide for an appropriate hearing upon due notice. * * * If the

29 U.S.C. 159(c), the Board, upon the filing of a decertification petition, is authorized to determine whether a question of representation exists, and, if it so finds, it is directed to hold an election. See *Lawrence Typographical Union* v. *McCulloch*, 349 F. 2d 704, 707 (D.C. Cir. 1965); *Surprenant Mfg. Co.* v. *Alpert*, 318 F. 2d 396, 399 (1st Cir. 1963); *Furr's, Inc.* v. *NLRB*, 350 F. 2d 84, 85-86 (10th Cir. 1965). Whether a question conerning representation exists "is essentially a factual issue" (*Modern Plastics Corp.* v. *McCulloch*, 400 F. 2d 14, 19 (6th Cir. 1968)) and, in determining that issue, the Board has discretion to establish appropriate criteria. *Lawrence Typographical Union* v. *McCulloch, supra*, 349 F. 2d at 707.

The Board's general policy of not proceeding to an election in the face of outstanding unfair labor practice charges is a reasonable exercise of the Board's discretion to determine whether a representation question is presented that can properly be resolved under the Board's election machinery. The commission of serious unfair labor practices, including an employer's refusal to bargain, can undermine the union's representative status and render impossible an election reflective of the employees' true and undistorted preferences. See NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704 (1944). Moreover, the usual remedy for a refusal-to-bargain violation is to require the employer to bargain in good faith notwithstanding that the union may have lost its majority status. *Franks Bros. Co.* v. *NLRB, supra*, 321 U.S. at 704-705. And, in certain circumstances, an employer's refusal to bargain may warrant extending the union's "certification year"—the period during which the Board will refuse to conduct an election—for up to a year after good-faith

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Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

bargaining commences. See *Raynal Plymouth Co.*, 175 N.L.R.B. 527 (1969). See generally *Brooks* v. *NLRB*, 348 U.S. 96 (1954). In light of these considerations, the courts of appeals have upheld the Board's "blocking charge" policy. See *Bishop* v. *NLRB*, 502 F. 2d 1024, 1029 (5th Cir. 1974); *NLRB* v. *Big Three Industries, Inc.*, 497 F. 2d 43, 51 (5th Cir. 1974); *Furr's, Inc.* v. *NLRB, supra*, 350 F. 2d at 85-86; *Surprenant Mfg. Co.* v. *Alpert, supra*, 318 F. 2d at 397 (citing cases).[12]

Petitioners' reliance (Pet. 17, 20, 21) on *Templeton* v. *Dixie Color Printing Co.*, 444 F. 2d 1064 (5th Cir. 1971), is misplaced.[13] Subsequent decisions of the Fifth Circuit have confined *Templeton* to its exceptional facts. See *Bishop* v. *NLRB, supra*, 502 F. 2d at 1032; *NLRB* v. *Big Three Industries, Inc., supra*, 497 F. 2d at 53-54. Thus, in *Bishop*, the Fifth Circuit held that a complaint seeking to compel the Board to process a decertification petition was not within the district court's jurisdiction because, in dismissing the employee decertification petition after the Board's "General Counsel ha[d] found enough substance to the allegations to form the basis of a complaint," the Board was "well within

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[12]There is no merit to petitioners' contention (Pet. 14) that the policy is subject to attack because the Board did not utilize the formal rulemaking authority of the Administrative Procedure Act. In formulating agency policy, the Board may proceed by adjudication or rulemaking, and the choice of method lie within the discretion of the Board. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293 (1974); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969).

[13]In *Templeton*, the Fifth Circuit found that the Board had mechanically invoked its "blocking charge" rule and thereby violated the express command of Section 9(c)(1) of the Act, which provides that the Board "shall investigate" all decertification petitions. However, the only alleged unfair labor practice concerning a refusal to bargain in that case had occurred several years before the case reached the court of appeals and a period of actual collective bargaining had transpired. The only matters still in issue concerned the reinstatement of some striking employees, an issue that did not go to the heart of the bargaining relationship. The court further noted that the union was not pursuing its bargaining rights. 444 F. 2d at 1066-1067.

the boundaries of its statutory mandate" (502 F. 2d at 1032). In so holding, the Fifth Circuit emphasized that *Templeton* involved unusual circumstances and represented "a very limited exception to the general rule of review of representation questions" (*ibid.*).[14] Here, as in *Bishop*, the decertification petition was dismissed after the General Counsel had issued unfair labor practice complaints, and, indeed, after the Administrative Law Judge had issued a decision sustaining the allegations of the complaints.[15]

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[14] *Bishop* also limited to its facts the decision in *Surratt* v. *NLRB*, 463 F. 2d 378 (5th Cir. 1972). In *Surratt*, the Fifth Circuit held that district court jurisdiction existed where the Board applied the "blocking charge" policy even though good-faith bargaining had apparently taken place during most of the union's certification year and the union had filed its unfair labor practice charges only after the decertification petition was filed. 463 F. 2d at 380. Furthermore, by the time the matter reached the court, a Board hearing had been held on the blocking unfair labor practice complaints and the NLRB Administrative Law Judge had recommended dismissal of all the charges. *Ibid.*

[15] Petitioners' contention (Pet. 15) that the Board should have given greater emphasis to their claim that the "union conduct, and not management misconduct, caused the [decertification] petition" overlooks that the Regional Director had previously investigated and refused to issue complaints on charges filed by petitioners alleging that the Union violated Section 8(b)(1)(A) and (B) of the Act by instituting a boycott of Company products. See *J. P. Stevens Employees Educational Committee* v. *NLRB*, 582 F. 2d 326, 328 (4th Cir. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

DOJ-1981-03